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June 16, 1995

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William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Informal Letter Comments
FCC Entrepreneur's Auction
PP Docket No. 93-253

Dear Mr. Caton,

The purpose of this letter is to summarize the views of two clients, Central Alabama Partnership L.P. 132 ("Central Alabama") and Mobile Tri-States L.P. 130 ("Mobile Tri-States") concerning the entrepreneur's band auction rules in light of the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*, No. 93-1841, 1995 U.S. LEXIS 4037 (June 12, 1995). Central Alabama and Mobile Tri-States are women-controlled small business limited partnerships whose partners are primarily small rural local exchange carriers. Both Central Alabama and Mobile Tri-States are poised to file their short-form applications in the entrepreneur's band auction, and both were expecting to use the full panoply of FCC preferences accorded small businesses, woman-controlled businesses, and rural telephone companies.

There is no doubt that *Adarand* now casts an imposing shadow of legal and regulatory uncertainty over any FCC auction rules giving preferences to businesses owned by women and

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business owned by minorities, the constitutionality of which was directly supported in a final Commission order by legal principles now overruled. See Second Report and Order, Implementation of Section 309(j) of the Communications Act: Competitive Bidding, 9 FCC Rcd 2348, 2398-400 ¶¶ 289-297 (1994) ("Second R&O"). If the Commission is indeed committed to applying *Adarand* fully,^{1/} then the Commission must heed the Supreme Court's instructions on the proper equal protection analysis of an affirmative action measure and "address the question of narrow tailoring . . . by asking, for example, whether there was 'any consideration of the use of *race-neutral means* to increase minority business participation.'" *Adarand*, 1995 U.S. LEXIS 4037, at *69-70 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989)) (emphasis added).

With the Commission's rationale for the minority and gender-based preferences resting on the "important and legitimate" objective of promoting economic opportunity for minorities and women who are underrepresented in the communications industry due to discrimination hindering their ability to raise capital, Second R&O, 9 FCC Rcd at 2398-99 ¶¶ 290-292, a small business not controlled by minorities or women challenging the auction preferences would argue that it has the same difficulty getting financing as businesses owned by minorities and women. Therefore, a court strictly applying *Adarand* would ask whether the existence of the C (and F) blocks exclusively for entrepreneurs and preferences for smaller businesses within those blocks provide an effective race-neutral opportunity for minority-owned and women-owned businesses to compete in the PCS auctions, given that many of these minority-owned and women-owned businesses are small businesses. It is our opinion that under *Adarand*, the Commission's race-based auction preferences could not withstand strict scrutiny under such a challenge, and given the views of the majority of the Court, it is unlikely that gender-based preferences would withstand judicial review. Retaining these preferences as promulgated under the present record will mean auction participants are bidding for the chance to enter post-auction litigation, rather than the wireless telecommunications marketplace. The uncertainty surrounding any license won detrimentally affects entrepreneurs' ability to raise the necessary capital to bid and eventually build their PCS operations, as financing will dry up from all but the most risk-taking (and usurious) sources. This will adversely affect the outcome of the auction itself, once prized by the Commission as spinning gold out of airwaves, because people will not pay much to buy a lawsuit.

As women-owned businesses, Central Alabama and Mobile Tri-States are willing to trade the now constitutionally-suspect preferences in exchange for absolute certainty that the auction winner will have no legal impediments to providing service quickly. Therefore, Central Alabama and Mobile Tri-States recommend that the Commission's only alternative under *Adarand* to insure expedient implementation of Block C PCS services is to revise the

^{1/} *FCC Postpones Application Deadline for Entrepreneurs' Block Auction*, Communications Daily, Vol. 15, No. 114 (June 14, 1995), at 1 (quoting Chairman Reed Hundt in speech given at Howard University).

entrepreneurs' auction rules to focus solely on economic threshold criteria for both the eligibility to bid in the auction (the \$125 million/\$500 million test), as well as eligibility for further preferences. For example, the Commission could maintain its current stratification differentiating the smaller from the larger entrepreneurs whereby:

- Businesses with less than \$40 million annual revenues get a 25% bidding credit and interest calculated at T-bill rate, 6 years interest only.
- Businesses with \$40-75 million annual revenues get a 10% bidding credit and interest calculated at T-bill rate, 3 years interest only.
- Businesses with \$75-125 million annual revenues get no bidding credit and interest calculated at T-bill rate plus 2½ percent, 2 years interest only.
- Rural telephone companies would receive an additional 5-10% bidding credit to enhance their ability to economically bring local exchange services to the most remote parts of the country.

It is our belief that minority-owned and women-owned businesses would be granted the most preferences under this proposal, since the majority of these entities fall into the smallest of business categories, and therefore, these economic-based race and gender neutral measures provide an opportunity for minority and women owned businesses to bid in the PCS auctions under the criteria set forth in *Adarand*.

Such small business entity preferences would clearly pass constitutional muster, since the basis for the preferences would be solely economic, not based on a suspect classification such as race or gender.^{2/} Furthermore, no fundamental right is implicated in the bidding for PCS licenses. Therefore, the preferences as discussed herein need only meet a rational basis test of constitutionality.^{3/} By fashioning the preferences in terms of economic categories, the FCC

^{2/} For example, it has long been known that "wealth" or "poverty" is not a suspect classification under equal protection analysis. See *Harris v. McRae*, 448 U.S. 297, 323 (1980) ("this Court has held repeatedly that poverty, standing alone is not a suspect classification"); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29 (1973) (the Court has never held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny).

^{3/} "In areas of social and economic policy, a . . . classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993) (and cases cited therein).

avoids the need to justify them under the equal protection - affirmative action rubric,^{4/} and the auctions can proceed quickly, and with certainty.

Because Central Alabama and Mobile Tri-States believe that the Commission must substantively change the entrepreneurs' band auction rules to bring them in line with *Adarand*, retention of the August 2, 1995 auction date will likely run afoul of the Administrative Procedures Act ("APA"), which requires adherence to the notice and comment procedures of 5 U.S.C. § 553 (1988) prior to substantive rule changes. The Commission would be ill advised to attempt rule changes without notice and comment under the APA's "good cause" exceptions,^{5/} for use of those exceptions is limited to emergency situations. *American Federation of Government Employees, AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (citing the legislative history of the APA). Even if the Commission were to make a public interest finding that it must proceed with the auctions quickly because the applicants are poised to apply and sources of funding might dry up, it is unlikely that a reviewing court would conclude that the situation was so compelling an emergency that the Commission could dispense with notice and comment rulemaking.^{6/} From the *Block* analysis, it is clear that a mere concern for urgency is not sufficient rationale to invoke "good cause" and forego the rulemaking requirements of Section 553 of the APA.

A short delay caused by a fast track notice and comment proceeding is far more desirable than the uncertainty caused by years of litigation as to whether the Commission followed proper procedures in promulgating the rules. As was the case in *Evans v. FCC*, Case No. 92-1317 (D.C. Cir. filed July 30, 1992), where the uncertainty of litigation prevented the 220 MHz industry from investing in construction for over two years, the uncertainty of a post auction challenge on APA grounds would result in low bid prices at the auction and a substantial delay in the construction of the C Block systems. After all, the amount of money to be invested is too large to assume the risk, particularly at a time when the United States Court of Appeals for the District of Columbia Circuit maintains a vigilant watch over situations where administrative agencies fail to follow the procedures established by Congress. It was clear to those who participated in the *Evans* litigation (including the undersigned who was counsel to parties intervening on the same

^{4/} Even if challenged as measures with de facto affirmative action effects, such a race-neutral program would easily pass constitutional muster under *Washington v. Davis*, 426 U.S. 229, 242, 248 (1976), where the Court held that strict scrutiny does not apply to statutes designed to serve neutral ends that, in practice, benefits or burdens one race more than another. *Cf. Adarand*, 1995 U.S. LEXIS 4037, at *69-70.

^{5/} 5 U.S.C. § 553(b)(3)(B); *see also id.* § 553(d)(3).

^{6/} Courts will rarely find that such an emergency situation exists, and will examine closely an agency's proffered rationales justifying the elimination of APA procedures. *Block*, 655 F.2d at 1157 n.6.

side as the Commission), that had the 220 MHz industry not settled with the Appellants and had the case gone to decision, the Commission would not have prevailed. The Commission should not make the same mistake twice, particularly where so much is at risk.

Therefore, Central Alabama and Mobile Tri-States recommend that the Commission begin a notice and comment proceeding immediately, with an expedited (but reasonable) pleading cycle: comments due 10 days after Federal Register publication; replies due 10 days thereafter, with no extensions of time granted. Within 20-30 days after the last pleadings are filed, the Commission can promulgate its revised entrepreneurs' block auction rules, schedule the FCC Form 175 due date for 30 days after the publication of the new entrepreneurs' auction rules in the Federal Register,^{2/} and set a new auction date as soon as the early fall.

Central Alabama and Mobile Tri-States agree with the Commission that the public interest will best be served by expedient PCS auctions, so that the winners can begin to provide service on this precious spectrum. Continued delay in the entrepreneurs' block auction will irreparably damage all those who planned to bid, due to the competitive disadvantages they will face as incumbent wireless operators become more entrenched. To that end, Central Alabama and Mobile Tri-States look forward to developing the record on post-*Adarand* auctions in a notice and comment rulemaking proceeding. In the meanwhile, if the Commission has any questions regarding the information and/or opinions expressed in the above letter, please contact this office.

Respectfully submitted,



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Howard C. Griboff

cc:	Chairman Reed E. Hundt	William E. Kennard
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^{2/} Id. § 553(d).